THEVATHASON PAKIANATHAN

v.

KWONG JOON

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[ORIGINATING MOTION NO. 25-37 OF 1989]
7 APRIL 1990

LAND LAW: *Private caveats - Removal of - Section 326 National Land Code (NLC) - Lapsing of caveats - Section 328 NLC - Whether prohibition against fresh caveat being entered at the end of six years of initial caveat.*

On 6 May 1980 a sale and purchase agreement was entered into between J the developer and the defendant in relation to a housing project to be built by J. The defendant paid a 10% deposit and J agreed to hand over vacant possession on 6 November 1981; the house was never built. On 4 December 1982, J charged this land (together with 26 other pieces of land) to the plaintiff. The defendant on 3 January 1983 lodged a caveat and instituted proceedings against J for specific performance of the agreement; that suit is still pending. On 16 February 1989, the defendant lodged a second and third caveat.

The plaintiff now applied for removal of the caveat filed by the defendant. The defendant's argument is that the charge was a "sham transaction without consideration" and that the charge was void as the plaintiff was not a licensed moneylender. The issue for determination by the Court was whether further caveats could be filed in respect of the same subject - matter by the same applicant after his original caveat had lapsed at the expiry of 6 years from the time from which it took effect under s. 328(1) of the National Land Code (the Code).

Held:

[1] An examination of the code did not reveal any express provisions prohibiting the entry of a fresh caveat after the lapse of the first caveat at the end of six years. *Damodaran v. Vasudeva* [1974] 1 MLJ 129 is only authority for the proposition that the Court has no power to renew or extend a caveat on the same ground and clearly does not forbid or disallow a fresh or further caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist.

[2] *Muhiudeen Rawther's* case and *Lim Kiat Moy's* case do not prohibit the entering of a fresh caveat even after the lapse of the first caveat based on a different ground or even on the same grounds if it is for the *bona fide* purpose of protecting the caveator's interest in respect of the same land.

[3] Section 328(1) of the Code merely provided for the normal longevity of a private caveat and envisaged a time frame within which the caveator should take action to realise his existing interest, it did not exist to extinguish his right to further protection of that interest if he had taken positive action to realise it, as was done here.

[Plaintiff's application dismissed with costs.]

Cases referred to:

Damodaran v. Vasudevan [1974] 1 MLJ 129
Lim Kiat Moy v. Hamzah [1966] 2 MLJ 175
K.I. Muhiudeen Rawther v. K.E.P. Abdul Kassim & Ors. [1959] 25 MLJ 257

Legislation referred to:
National Land Code 1965, ss. 326, 328(1)

For the plaintiff - P. Suppiah; M/s. J. Singh & Co.
For the defendant - L.J. Lau; M/s. Foo & Woon

JUDGMENT

LC Vohrah J:

This was an application on the part of the plaintiff (chargee) to remove a caveat filed by the defendant in respect of a piece of land known as HS(D) 19335 TLO 10489 Township of Johor Bahru ("the said piece of land").

The facts as discerned from the affidavits filed are as follows. By a sale and purchase agreement executed on 6 May 1980 between Jet Age Construction Sdn. Bhd. ("the developer") and the defendant it was agreed that the developer would sell the said piece of land together with a dwelling house to be built thereon for a total purchase price of RM65,010. The defendant paid the sum of RM6,501 to the developer as deposit and a further sum of RM350 as additional payment for improvement on the house lot. The developer contracted to build the dwelling house and hand over vacant possession by 6 November 1981. The house was never built. On 4 December 1982 the developer charged the said piece of land together with 26 other pieces of land in respect of other purchasers to the plaintiff. On 3 January 1983 the defendant caused a private caveat to be lodged on the said piece of land ("the first caveat") to protect his interest "as a *bona fide* purchaser with valuable consideration". On 17 October 1985 the defendant filed Suit No. 999/85 against the developer for, *inter alia,* specific performance of the sale and purchase agreement or for damages in lieu. This suit is still pending. On 16 February 1989 after the expiry of the first caveat the defendant lodged another caveat which he withdrew on 26 April 1989 ("the second caveat"). On the very same day the defendant lodged yet another caveat ("the third caveat") on the ground that he had filed the civil suit against the developer. No less than 13 civil suits have been filed by various purchasers (apart from the defendant) against the developer in respect of its housing project.

The defendant in his affidavit-in-reply alleged, *inter alia,* that the charge created in respect of the said piece of land was a "sham transaction without consideration" and that the charge transaction was void because the plaintiff was not a licensed moneylender and opposed the application in order to protect his interest until the disposal of his suit.

It would be convenient at this point to reproduce the relevant provisions of the National Land Code which were referred to by Counsel. Section 326 relating to the removal of private caveats by the Registrar reads:

> (1) Any person or body whose land or interest is bound by a private caveat may at any time apply in Form 9 to the Registrar for its removal, and such application shall be accompanied by the prescribed fee.
>
> (1A) On receiving any application for removal under this section, the Registrar shall:
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> (a) serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and
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> (b) subject to sub-section (2), remove the caveat at the expiry of the period of one month specified in that notice.

(2) The Court may, on the application of any person or body on whom such a notice has been served (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of one month; and the Registrar, on being duly served with any order of the Court under this sub-section, shall not remove the caveat until the expiry of the said period as thereby extended.

(3) The Registrar shall remove any caveat pursuant to this section by cancelling the entry thereof on the register document of title, and noting thereon the reason for the cancellation and the date thereof.

(4) Every cancellation under sub-section (3) shall be signed and sealed.

Section 328 relating to lapse of private caveats reads:

(1) A private caveat shall, if not sooner withdrawn under s. 325 or removed by the Registrar pursuant to s. 326 or an order of the Court under s. 327, lapse at the expiry of six years from the time from which it took effect, and the entry thereof may be cancelled accordingly by the Registrar, either of his own motion or on an application in that behalf by any interested person or body.

(2) Every cancellation under sub-section (1) shall be signed and sealed.

At the hearing of this application Counsel for the plaintiff submitted that there was only one issue for determination and that it was a purely legal issue as to whether further caveats could be filed in respect of the same subject-matter by the same applicant after his original caveat had lapsed at the expiry of 6 years from the time from which it took effect under the provisions of s. 328(1). The only authority he cited for the determination of this issue (which was also the sole authority relied upon by Counsel for the defendant) was the case of *Damodaran v. Vasudevan* [1974] 1 MLJ 129. This authority dealt with the question as to whether it was proper for two private caveats to be issued at the instance of the same applicant in respect of the same land and on precisely the same grounds. Counsel for the plaintiff contended that once a caveat had lapsed no further caveats could be filed in respect of the same subject matter and referred to what Syed Agil Barakbah J (as he then was), when addressing his mind specifically to the provisions of s. 326(2) of the Code relating to the removal of private caveats by the Registrar of Titles, had to say at p. 129:

> The object of the sub-section is dealt with in precise detail by Raja Azlan Shah J (as he then was) in *Lim Kiat Moy v. Hamzah* [1966] 2 MLJ 175) which I accept with respect. It is clear that the word "extend" appearing in the sub-section has to be construed according to "its use in the common intercourse of mankind and the popular meaning attributed to it is that it enlarges or gives further duration to any existing right rather than re-vest an expired right". In other words, it points to the existence of a caveat which it allows to be extended by order of Court from time to time. It does not speak of a recreation as to allow the issue of another caveat on or before the expiry of the existing one. This is because once a caveat has lapsed and a memorial thereof is made by the registering authority, it is extinguished forever and the Court has no power to revive, renew or continue a caveat after its lapse. The extinction is final and irrevocable. (Per Ong J (as he then was) in *K.I. Muhiudeen Rawther v. K.E.P. Abdul Kassim & Ors.* ([1959] 25 MLJ 257).) If the sub-section were to be construed otherwise a great public injury would be effected by calling back a right that by lapse of time has become extinct. (Per Raja Azlan Shah J (as he then was) in *Lim Kiat Moy's* case, *supra*). Further, s. 328(1) provides for a caveat to lapse at the expiry of six years from the time from which it took effect unless earlier withdrawn or removed. Considering its object and function the period is long enough for one caveat to be in existence at any one time without there being entered another caveat.

and at p. 130:

> If the law is allowed to be circumvented by recognising the second caveat the result will undoubtedly be an overlapping of caveats on the same land, on the same ground and by the same caveator.

However, Counsel for the defendant argued that the same authority allowed the third caveat to be lodged on a new ground, namely the institution of the civil suit for specific performance of the sale and purchase agreement in 1985, a ground which did not exist in 1982 when the first caveat was lodged. She relied on an earlier statement of the learned Judge in the same penultimate paragraph also at p. 130 as follows:

> ... The subsection may be construed as to enable another caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist. In other words it is not a renewal, revival or continuance of the former; it speaks of an entirely separate caveat distinct from the other.

It was not in dispute that the ground on which the third caveat was lodged was a new and fresh ground and my function was to determine whether there was anything in law which prevented a further caveat from being lodged upon the lapse of the first caveat at the expiry of six years from the time from which the first caveat took effect. In other words did the automatic lapsing of the first caveat on the expiry of six years extinguish finally and irrevocably the caveatee's right to lodge another caveat?

An examination of the National Land Code did not reveal any express provisions prohibiting the entry of a fresh caveat after the lapse of the first caveat at the end of six years. The only judgment that was cited by both Counsel for consideration of this question, as I mentioned, was *Damodaran v. Vasudeva* (*supra*) but that case only lays down the proposition that the Court has no power to renew or extend a caveat on the same ground and clearly does not forbid or disallow a fresh or further caveat "to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist."

It was only in *Muhiudeen Rawther's* case that it was stated that once a caveat had lapsed and a memorial made by the registering authority it was extinguished forever. That case however dealt with the powers expressly given to the Court by the former Land Code (Cap. 138) and related to specific provisions which were not identical or comparable provisions of the National Land Code or to s. 328 thereof relating to the lapse of private caveats. *Lim Kiat Moy's* case turned on the interpretation of the specific provisions of s. 326 of the National Land Code and was concerned with the meaning of the word "extend" in that section. I did not think that both these authorities which were cited in *Damodaran v. Vasudeva* to support the proposition that a second caveat may not be entered at the instance of the same applicant in respect of the same land and on precisely the same grounds under the National Land Code in any way prohibited the entering of a fresh caveat even after the lapse of the first caveat based on a different ground or even on the same grounds if it is for the *bona fide* purpose of protecting the caveator's interest in respect of the same land. It was my judgment that if a contrary view was taken there would be no way in which a caveator like the defendant who had already filed his action could protect his existing interest pending resolution of his dispute by the Court. It seemed to me that s. 328(1) merely provided for the normal longevity of a

private caveat and envisaged a time frame within which the caveator should take action to realize his existing interest; it did not exist to extinguish his right to further protection of that interest if he had taken positive action, as was done in the present case, to realize it.

I accordingly dismissed the application with costs.

Also found at [1990] 2 CLJ 308